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No. 80-1565

In the Supreme Court of the United States

CENTRAL TRUST COMPANY ROCHESTER, N.Y., PETITIONER

v.

OFFICIALS CREDITORS' COMMITTEE OF GEIGER ENTERPRISES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1980

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MEMORANDUM FOR THE UNITED STATES

Petitioner seeks review of the decision below holding that a debtor may dismiss its petition filed pursuant to Chapter XI of the Bankruptcy Act, ch. 541, 30 Stat. 544, as added by ch. 575, Section 301, 52 Stat. 905 *et seq.* (11 U.S.C. 701 *et seq.*) and refile pursuant to Chapter 11 of the Bankruptcy Code (11 U.S.C. (Supp. III) 1101 *et seq.*), enacted by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2625 *et seq.*, in order to consolidate its bankruptcy proceeding with those of its subsidiaries that were filed pursuant to the Bankruptcy Code. The court of appeals held that such actions were permissible as long as the objecting creditors cannot demonstrate material prejudice to their substantive rights.

1. The relevant facts may be briefly summarized as follows: On August 15, 1979, the debtor, Geiger Enterprises, Inc., filed a petition in the United States District Court

for the Western District of New York seeking relief under Chapter XI of the Bankruptcy Act (Pet. App. A-3). The debtor has continued the operation of its business as a debtor-in-possession, but has not yet submitted a plan of arrangement. Numerous creditors filed proofs of claim against the debtor, including the United States, which filed a claim in the amount of $2,075,674.64, for unpaid corporate income, excise, highway use, withholding, and unemployment taxes. An Official Creditors' Committee was authorized by the bankruptcy court on December 19, 1979, to represent the interests of the many creditors with comparatively small claims (J.A. 3, 359).[1]

On January 10, 1980, the debtor sought to dismiss its petition on the condition that it be permitted to refile for relief under Chapter 11 of the new Bankruptcy Code. It represented to the bankruptcy court that three of its subsidiaries (Oilatomic, Inc., Willie the Whale, Inc., and River Road Oil Co., Inc.) had filed petitions for relief under Chapter 11 of the Bankruptcy Code and that three other corporations which the debtor owned (Budget Gas, Inc., Queen City Filling and Manufacturing, Inc., and Hard Rock Paving Company, Inc.) planned to file petitions for relief. It sought an order providing for consolidation of these proceedings under the Bankruptcy Code. Both petitioner, a secured creditor, and the United States opposed the motion (J.A. 3, 9-10, 12, 38-43).

The bankruptcy court granted the debtor's motion to dismiss its petition (Pet. App. A-9 to A-13). On the same day, the debtor thereupon filed a petition seeking relief under Chapter 11 of the new Bankruptcy Code (*id.* at A-30 to A-31), together with its subsidiaries, Auto Stop Gas, Inc.,

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[1]The Committee does not represent either petitioner or the United States.

Queen City Filling and Manufacturing, Inc., Hard Rock Paving Company, Inc., and Budget Gas, Inc. (*id.* at A-3). The district court reversed the order of the bankruptcy court. It held that the dismissal and refiling would permit the bankruptcy court to apply the provisions of the new Bankruptcy Code to a petition filed under the Bankruptcy Act, and that such a result was contrary to the plain meaning of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, Title IV, Section 403(a), 92 Stat. 2683 (11 U.S.C. (Supp. III) prec. 101 note), and its legislative history. The district court rejected the debtor's argument that the court should carve out a judicial exception giving it discretion to dismiss in view of the desirability of consolidation (Pet. App. A-16 to A-20).

The court of appeals reversed. It ruled that the debtor was entitled to refile its petition unless the objecting creditors, petitioner and the United States, could establish actual and material prejudice to their rights resulting from the application of the provisions of the Bankruptcy Code. Accordingly, the court of appeals remanded the case for a determination concerning prejudice and, in the event no prejudice is demonstrated, for a finding concerning whether consolidation would be appropriate (Pet. App. A-1 to A-8).

2. The United States agrees with petitioner that the decision below erroneously undermines Section 403(a), the transitional rule enacted by Congress to govern cases filed pursuant to the Bankruptcy Act that were pending on the date the Bankruptcy Code, with its substantial revision of bankruptcy law, became effective. Section 403(a) provides:

> A case commenced under the Bankruptcy Act, and all matters and proceedings in or relating to any such case, shall be conducted and determined under such Act as if this Act [the new Bankruptcy Code] had not been enacted, and the substantive rights of parties in

> connection with any such bankruptcy case, matter, or proceeding shall continue to be governed by the law applicable to such case, matter, or proceeding as if the Act had not been enacted.

The meaning of this provision is clear—a case commenced under the Bankruptcy Act must be conducted and determined pursuant to its provisions, not pursuant to the provisions of the new Bankruptcy Code. The prohibition of Section 403(a) is not conditioned upon a showing of material prejudice to creditors. At all events, given the substantial changes affecting the treatment of tax claims in bankruptcy, it cannot be doubted that the government's claim is materially prejudiced by permitting the debtor to take advantage of the provisions of the new Bankruptcy Code.[2] Furthermore, the United States agrees with petitioner that, contrary to the court of appeals' belief (Pet. App. A-6), Rule 11-42 of the Rules of Bankruptcy Procedure, which authorizes the voluntary dismissal of a petition, does not authorize a dismissal for the purpose of filing a new petition for relief pursuant to the Bankruptcy Code. As its terms make clear, Rule 11-42(a) contemplates that the debtor will either be adjudicated a bankrupt or continue its operations without the benefit of the bankruptcy laws.

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[2]For example, as the court of appeals acknowledged (Pet. App. A-7), pursuant to the provisions of the Bankruptcy Act (Sections 337(2), 361 (11 U.S.C. 737(2), 761)), the government as a priority creditor could insist upon a deposit in full of the amount due it prior to confirmation of any plan of arrangement, but the new Bankruptcy Code (11 U.S.C. (Supp. III) 1129(a)(9)(C)) entitles the government only to deferred cash payments. In addition, under the Bankruptcy Act (Section 64a (11 U.S.C. 104(a)) tax claims are accorded fourth priority, whereas the Bankruptcy Code (11 U.S.C. (Supp. III) 507(a)) relegates tax claims to sixth priority. Furthermore, there are substantial differences in the government's substantive rights concerning the lien claims it is asserting. See Bankruptcy Act, Section 67c(3) (11 U.S.C. 107c(3)); cf. 11 U.S.C. (Supp. III) 724(b).

Despite the error of the decision below, we did not seek certiorari because of the absence of a conflict among the courts of appeals, the possibility that the government may prevail in the proceedings on remand, and the limited administrative importance of the question presented dealing with the transitional rules governing the enactment of the new Bankruptcy Code. If, however, the Court grants review, we will argue in favor of reversal of the decision of the court of appeals.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1981

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